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In The

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners

v.

MICHIGAN ACADEMY OF FAMILY PHYSICIANS, ET AL.,
Respondents

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENTS

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I.

QUESTIONS PRESENTED

Did the Court of Appeals correctly conclude that 42 USC Section 1395ff and 42 U.S.C. Section 405(h) do not deprive Respondents of a judicial forum for redress of their substantial statutory and constitutional claims?

If it is determined that 42 U.S.C. Section 1395(ff) and 42 U.S.C. Section 405(h) do authorize an agency of the federal government to violate the Medicare statute or the Fifth Amendment to the United States Constitution with no forum for those affected to take redress, does such lack of forum violate the United States Constitution?

II.

PARTIES TO THE PROCEEDING

Petitioners' description is accurate.

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BRIEF OF RESPONDENTS

OPINIONS BELOW

Petitioners' citation to the opinions and judgments below is accurate..

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATION INVOLVED

Petitioners' statement as to the statutory provisions and regulations involved are accurate. The statutory provisions and regulations are reproduced in Petitioners' appendix.

STATEMENT

1. Background

This case involves a challenge to a regulation promulgated by the Department of Health and Human Services which permitted differential treatment of certain allopathic (M.D.) family physicians and those patients who chose to be treated by them versus all other allopathic physicians and their patients under the Medicare Program. The differential treatment invalidated by both the trial court and the Court of Appeals is implemented through the creation and maintenance of a separate fee screen which placed family physicians in the same fee screen as podiatrists, chiropractors, and dentists while physicians with different specialties were placed in a separate fee screen consisting only of physicians. The Michigan Academy of Family Physicians, consisting of approximately 1,500 allopathic physicians, is a state chapter of the national organization known as the American Academy of Family Physicians (D.E. 76, Pretrial Order). Family physicians specialize in primary care, sometimes described as first contact care, providing comprehensive health care to the entire family. Family practice is distinct through the treatment of the entire family in a first contact care setting regardless of sex or age. However, there is considerable overlap between specialty areas and other physicians commonly practice primary care including internists, pediatricians, and possibly obstetricians and gynecologists. Family physicians are trained in the context of an office-based practice to treat approximately 90 percent of the medical problems that are presented (testimony of E. Harvey Estes, M.D., D.E. 131 at 15; testimony of Robert Vitu, M.D., D.E. 139 at 32). Family physicians are established as board certified or board eligible by the American Board of Family Practice which was established in 1969. At the time of trial there were 17 approved residency programs in family practice in the State of Michigan including the three medical schools within the State of Michigan, the Uni-

versity of Michigan, Wayne State University, and Michigan State University (Vitu, D.E. 129 at 11).

2. The Medicare Statute

Petitioners' description of the Medicare Program is sufficient and will not be repeated here in detail, except for those provisions that relate to the present case or those provisions not discussed by Petitioners. Under Part B of the Medicare Program the Secretary is authorized to enter into contracts with private insurance companies for its administration. 42 U.S.C. 1395u.

Under Part A, determinations of both "entitlement to benefits" and "amount of benefits" are made by the Secretary. 42 U.S.C. Section 1395ff(a). Under Part B the determination of "entitlement to benefits" is made by the Secretary. Under Part A, an individual disssatisfied with either an eligibility or amount of benefits determination is entitled to a hearing by the Secretary and to judicial review of the Secretary's final decision pursuant to 42 U.S.C. 405(g). In contrast, 42 U.S.C. Section 1395ff(b) provides for a hearing by the Secretary and judicial review of the Secretary's final decision only where an individual is dissatisfied with eligibility determinations under Part B.

The hearing rights of individuals dissatisfied with an "amount of benefits" determination under Part B consists of a hearing before a carrier selected by the agency to administer the Medicare Program, here Blue Cross and Blue Shield of Michigan. Specifically, Section 1395u(b)(3)(C) provides that an individual will be granted an opportunity for a "fair hearing by the carrier" in cases of controversy over $100.00 with regard to services furnished and denied or not acted upon with reasonable promptness.

A fair hearing conducted by the carrier is controlled by regulations promulgated by the Secretary and certain provi-

sions of the "Carrier's Manual."[1] The types of challenges that may be heard by the carrier are carefully delineated by regulation. See 42 C.F.R. 405.801, *et seq*. The regulations provide for a hearing when a party is dissatisfied with a determination denying a request for payment, the amount of payment, or where the request for payment is not acted upon with reasonable promptness. A party is then given a right to a "fair hearing" (42 C.F.R. 405.820) conducted by a hearing officer designated by the carrier (42 C.F.R. 405.823). The jurisdiction of the hearing office is carefully circumscribed by regulations as follows:

> The hearing officer in exercising the authority to conduct a hearing on this Section 1842(b)(3)(c) of the Act is to comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as with policy statements, instructions, and other guides issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the carrier. 42 C.F.R. 405.860.

The restrictions imposed upon the hearing officer's jurisdiction is made even more explicit by the Carrier's Manual, the compilation of guidelines a hearing officer is bound by the above regulation to follow. Section 12016 of the Manual states:

> Authority — the HO occupies a significant position in the administration appeals process affording dissatisfied individuals with hearing rights provided in Section 1842(b)(3)(C) of the Act. Authority of the HO is limited to the extent that he must comply with all provisions of Title XVIII of the Act and regulations issued thereunder, as well as with HCFA rulings, generals instructions, and

[1] The Carrier's Manual was compiled by the Health Care Financing Administration. Its declared purpose is to serve as "practical operation instructions needed by the contractors responsible for the administration of the supplementary and medical insurance program — Part B Medicare." (Forward to Carrier's Manual.)

other guides issued by HCFA with the Medicare Bureau. *The HO does not have the prerogative of overruling the provisions of the law or of interpreting them in a way different than that of the Medicare Bureau when he is in disagreement with their intent; nor may he use hearing decisions as a vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program.* (Emphasis added.)

3. Proceedings

Plaintiffs commenced this action on the 8th day of October, 1976 (D.E. 1). The complaint was amended twice (D.E. 68, 78). Plaintiffs consist of the Michigan Academy of Family Physicians, Charles Farber, M.D., Lester Webb, M.D., board eligible family physicians, Glenn House, M.D., a board certified family physician, and Carol Diedrich, a Medicare beneficiary who selected Phillip Lang, M.D., a family physician, as her primary physician. Plaintiffs allege that the different treatment of family physicians, compared to all other types of physicians in the State of Michigan, violated substantive due process requirements of the Fifth Amendment to the United States Constitution and the Medicare statute. Plaintiffs also allege that the failure to provide Plaintiffs a hearing in which Plaintiffs could contest the fee differential violated Plaintiffs procedural due process rights under the Fifth Amendment. Plaintiffs sought no monetary relief but merely a determination that the maintenance of separate fee schedules by Defendants violated the Medicare statute and the Fifth Amendment. Plaintiffs requested that the court enjoin Defendants from treating family physicians differently from all other physicians for purposes of Medicare reimbursement.

Prior to suit, on October 9, 1974, the individual physicians requested a hearing with the carrier to contest the validity of the carrier's actions with regard to separate fee

schedules (D.E. 135, Pl. Ex. 15, 38, and 80)[2]. On March 31, 1975, the carrier indicated that an adjudication as to the reasonableness of the specialty differential could not be involved and the carrier would accept no adjudication which eliminated such a differential (D.E. 135, Pl. Ex. 49). Additionally, Carol Diedrich, without counsel, protested the prevailing fee determination as to services performed by Dr. Lang and was notified by the carrier that she was without recourse and nothing could be done (Diedrich, D.E. 92 at 14).

Prior to trial, the Secretary moved to dismiss Respondents' complaint for lack of jurisdiction as to the statutory claim and as to the constitutional claim on the basis that the claim was insubstantial. In December, 1977, the Secretary's motion was denied by the Honorable James Churchill in the memorandum opinion which noted:

> I am influenced by the improbability that Congress would intentionally authorize an administrative agency to delegate to a private contractor the power to violate the Constitution of the United States in the name of the United States without recourse. (J.A. at 10)

The undisputed facts at trial established that in determining the prevailing fee limitation the carrier established three separate groupings of physicians and non-physicians generally referred to as three "screens." Screen one was generally called the "nonspecialist screen" and consisted of osteopathic and allopathic physicians who were family practitioners, chiropractors, podiatrists, and dentists. Screen two was made up of board certified and non-board certified

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[2] Petitioners did not order a transcript of the entire lower court proceedings. On the first date of trial, September 15, 1980, all but a few of Plaintiffs' exhibits were admitted without objection. The transcript of the admission of these exhibits was not produced. However, all exhibits cited herein were transmitted to the Sixth Circuit and are reflected in the Joint Appendix as Docket Entry 135. Counsel have agreed that the exhibits referenced herein were admitted at the lower court and have agreed to refer to the exhibits by number and docket entry.

osteopathic and allopathic internists for in-patient hospital services only. Screen three, commonly referred to as the "specialist screen" was made up of all osteopathic and allopathic board certified family physicians, all physicians other than family physicians, whether board certified or not, both osteopathic and allopathic (D.E. 76, pretrial order). In addition, physicians who practice as a group of at least three were placed within the third or the specialist screen regardless of specialty board status (D.E. 133 at 20-21).

For purposes of determining the prevailing fee limitation, all charges within each screen are grouped together so that the prevailing fee is established at that dollar amount that will pay 75 percent of all charges. 42 U.S.C. 1395u. Physicians billing Medicare use a document called a "Physician's Manual" which lists approximately 3,000 separate procedure code numbers with a description of the service performed for each individual number (D.E. 135, Pl. Ex. 83). Prevailing fee limitations are established for each of the approximately 3,000 procedure code numbers. The effect of this multiple fee calculation was a different prevailing ceiling depending on the individual patient's choice of treating physician. For example, in the case of office visits (which represent 40 percent of all payments under Part B of the Medicare program) the prevailing fee limitation for 1980 in the Lansing, Michigan area is represented in the following chart:

PREVAILING FEE LIMITATIONS

Service	Screen 1	Screen 2 (Hospital Visits Only)	Screen 3
Initial Comprehensive Office Visit	$25.00	N/A	$50.00
Follow-up Office Visit	$10.70	N/A	$12.30
Inpatient Hospital Visit	$35.70	$50.00	$50.00

When patients such as Diedrich choose a family physician who refuses to accept such differentials, the difference in reimbursement must be made up by the patient (D.E. 92 at 10, 14).

Petitioners have referred to screen 1 as a "GP screen" and screen 2 and 3 as "specialist screens." In fact, the grouping may be more appropriately labelled as non-M.D. dominent (I) and M.D. dominent (II, III). The three screens consist of the following types of health care providers:

(A) Screen 1 — 1,276 allopathic family physicians, 937 osteopathic physicians, 437 podiatrists, and 632 chiropractors,

(B) Screen 2 — 1,616 allopathic physicians, 172 osteopathic physicians, and

(C) Screen 3 — 7,837 allopathic physicians, 888 osteopathic physicians (D.E. 135, Pl. Ex. 31, 44).

The podiatrists and chiropractors who nearly equal the number of the allopathic family physicians placed within screen 1, are carefully limited in terms of the treatment they may render. See M.C.L.A. 333.18001(1)(d); M.C.L.A. 333.16401(1)(b), *DeHart* v *Board of Podiatry*, 97 Mich. App. 307 (1980); *Demido* v *Attorney General*, 100 Mich. App. 254 (1980). Both licenses require two years of education in an accredited school and, depending on the date obtained, a high school degree (or equivalent) or two years of undergraduate experience.

In contrast, the allopathic physicians placed within this grouping consist of recent family physician residency graduates who have not yet taken the certifying examination or in the alternative, allopathic physicians who graduated from medical school prior to the establishment of the American Board of Family Practice of 1969, but have the benefit of years of experience in their field.

At trial numerous individuals testified including physicians; Robert Vitu, M.D. (a board certified family physician); E. Harvey Estes, M.D. (a board certified internist and cardiologist, and member of the Institute of Medicine, which is the medical branch of the National Academy of Sciences); and Phillip Lang, M.D., a non-board certified family physician. Also testifying was Paul Feldstein, Ph.D., (Professor of Economics at the University of Michigan, Department of Public Health) and various employees of the carrier and HHS including William Boyles (carrier employee who had the responsibility for establishing the Medicare reimbursement program in the State of Michigan at the inception) and Louis Hayes, M.D. (Medical Director for the carrier).

Dr. Lang is a family physician who had practiced in Lansing, Michigan for 23 years as of the date of trial. He graduated from Wayne State University Medical School in 1948 at a time when formal family practice residency programs were not available to graduates. He is a professor at Michigan State University teaching students in family practice (D.E. 124 at 47). Respondent Carol Diedrich is a Medicare recipient who had been treated by Dr. Lang for over 23 years at the time of trial. Dr. Lang treats her parents, her younger brother, older sister, and has delivered her three children (D.E. 124 at 44-47). Diedrich is a Medicare recipient by virtue of disability. The record reflects repeated reductions in claims submitted by Diedrich as a result of the multiple screen reimbursement mechanism utilized in Michigan (D.E. 135, Pl. Ex. 67, D.E. 92 at 10). She has attempted to determine the reason for reduction in reimbursement and has been told by the carrier that it was reduced based upon prevailing fees and nothing could be done about it (Diedrich D.E. 92 at 14). Diedrich realized that her out-of-pocket expenses would be less if she was treated by a specialist, but she refuses to change physicians because Dr. Lang treats all her problems and because he treats her entire family (D.E. 92 at 14).

Petitioners have not seen fit to appeal the lower court decisions on the merits (see Petition for Writ of Certiorari, October Term, 1984, fn. 5, Petition for Writ of Certiorari, October Term, 1985, fn. 11). Nonetheless, Petitioners brief goes into substantial detail in an attempt to demonstrate a rationale for the regulation invalidated by both the district court and the U.S. Court of Appeals (Pet. brief at 7, 43, 44). Petitioners' brief reduces to a footnote a key concession at trial being that the Government had no rationale in support of its treatment of board eligible family physicians (Pet. brief at fn. 2). In fact, while stipulating that it had no rationale, the Government declined at trial to afford Respondents any relief (D.E. 132 at 63).

Petitioners assert that the regulation in question reflects the Congressional intent to reflect the marketplace in implementing reasonable charge calculations under the Medicare Program. While there is support for the proposition that Congress intended to reflect the marketplace in determining reasonable charges under the Medicare Program and to use carriers such as Blue Cross and Blue Shield plans to achieve this purpose, there is absolutely no support in the record that the regulation in question, 42 C.F.R. 405.504(b), furthered this purpose. Testimony established that prior to the implementation of the Medicare Program the carrier made no distinction between physicians according to specialty for purposes of determining the amount of payment under their private business (Boyles D.E. 131 at 34). The Medicare statute was modeled after a program known as the "Variable Fee Program" established by the National Blue Shield Plan for determining physicians' reasonable charges. The National Blue Shield Plan provided no distinctions in calculating the prevailing fee based upon a physicians specialty (Boyles D.E. 131 at 35-36, D.E. 135, Pl. Ex. 24). Carrier employees further testified that they prepared a proposal for the contract as the carrier in Michigan modeling this proposal after the Variable Fee Program. The first proposal did not draw any distinction between family physicians and

other type of allopathic physicians (Boyles, D.E. 131 at 34). These employees were notified that the government "preferred" specialty screens (Boyles, D.E. 131 at 37). In short, the Secretary added a new requirement in determining reasonable charges reflected neither in the marketplace nor in the program the Medicare statute patterned itself after.

The attempt of Petitioners to characterize the physicians within the specialty screen as performing a higher level of service and therefore not similar, is also repudiated by unrebutted testimony at trial. It is a well recognized phenomena that specialists in areas other than primary care are performing primary care procedures. Studies have indicated that approximately 50 percent of a specialty physician's medical services are in areas outside of the physician's specialty. This is particularly true of general surgeons as there is an excess number of general surgeons in Michigan and a shortage of family physicians (Estes, D.E. 131 at 9; Hayes, D.E. 87 at 104, 130). Statistics would indicate that 73 percent of the surgeons in Michigan spend ten to 25 percent of their time in primary care (Hayes, D.E. 87 at 102). There was also testimony to demonstrate the causal effect between the excess number of specialists and higher medical costs (Hayes, D.E. 87 at 130).

In the face of this unrebutted testimony, Petitioners suggest that the question of similarity of service is a matter within the Secretary's discretion and such determinations were delegated by Congress to the Secretary and carrier (Pet. brief at 6, 26). Such an assertion ignores the clear and unequivocal language of 42 U.S.C. 1395u(b)(3) which states that in determining reasonable charges,

> No charge may be determined to be reasonable in the case of bills submitted or request for payments made under this Part . . . if it exceeds the higher of (i) the prevailing charge recognized by the carrier and found acceptable by the Secretary for *similar services* in the same locality . . . or (ii) the prevailing charge level that,

> on the basis of statistical data and methodology acceptable to the Secretary, would cover 75 percent of the customary charges made for *similar services* in the same locality during the last preceding calendar year . . . (Emphasis added).

While intimating that the Secretary considered the issue of similarity of services in promulgating the regulation Petitioners have failed to cite any portion of the trial record for this suggestion. In fact, all witnesses whether called by Petitioners or Respondents indicated otherwise. All the government witnesses, whether from the central office of HHS, the regional office of HHS, or the carrier agreed that the statutory phrase "similar service" means submission of the same procedure code number under the Physician's Manual (Remington, D.E. 133 at 8; Riesel, D.E. 132 at 69; Barnett, D.E. 124 at 6-7). Additionally, the medical testimony was unanimous that the medical practices most similar to each other in primary care were internists and family physicians and that when the same medical description is utilized by physicians (such as comprehensive examinations or limited examinations) the services are similar. The professionals testifying to this effect included the carrier's own Medical Director (Hayes, D.E. 87 at 140), the Plaintiff family physicians (Vitu, D.E. 129 at 35-37), and E. Harvey Estes, M.D., an internist (D.E. 131, at 5-8). In fact, the relief granted by the Court after modified by the U.S. Court of Appeals for the Sixth Circuit did nothing more than require the Secretary to consider the statutory mandate for similar services regardless of who performs that service. In response to the U.S. Court of Appeals' order, the government eliminated all multiple screens within the State of Michigan and established a single prevailing fee calculation for each individual medical service regardless of who performs that service. Thus, once applying the statutory language, Petitioners abandoned the separate screen concept as inconsistent with the statutory language. Stripped of its rhetoric, the government's brief is nothing more than a continuation of the gov-

ernment's repeated attempt to ignore this clear legislative mandate.

On December 30, 1980, the Honorable Horace Gilmore issued his opinion in *Michigan Academy of Family Physicians* v *BCBSM*, 502 F. Supp. 701 (E.D. Mi. 1980). In holding for Respondents the Court noted:

> There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump M.D.s who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason. (Pet. App. 31a)

The district court found the regulation authorizing such a classification scheme to be plainly inconsistent with the Medicare statute which "mandates the customary charges of physicians for similar services be the test for reimbursement" (Pet. App. 30a).

The district court furthermore found that this classification scheme violated yet another provision of the Medicare Act, 42 U.S.C. Section 1395a because it intended to influence a beneficiary's choice of physician and reduce that beneficiary's reimbursement solely by virtue of the choice of the type of physician to perform a particular medical service. Since the district court found the Secretary's and carrier's actions to be a clear violation of the Medicare Act, it did not consider the constitutional arguments advanced by Respondents. (Pet. App. at 32a).

In an opinion dated February 23, 1984, the Court of Appeals affirmed the district court's rulings on jurisdiction and on the merits except for remanding the case to the Secretary for reconsideration of the reimbursement plan

with the proper focus of "similar service" (Pet. App. 1a-15a). As to jurisdiction, the Court of Appeals recognized that this Court's decision in *United States* v *Erika*, 456 U.S. 201 (1982), held that Congress clearly and convincingly intended no judicial review of amount of benefits cases. After a review of the applicable statutes and case law, the Court, however, concluded that jurisdiction did exist under the particular circumstances of this case since there would be no other forum for Respondents to press their statutory and constitutional claims (Pet. App. 8a, 9a).

As to the merits of Respondents' case, the Court of Appeals found that the "touchstone" of 42 U.S.C. Section 1395u(b)(3) is "similar service" and there was an obvious inconsistency between the statute and the disputed regulation. The Court of Appeals found the regulation "irrational" and "invalid" (Pet. App. 13a). Because the regulation was statutorily unsound, the Court did not address the constitutional issues raised in the case (Pet. App. 13a).

Following a petition for writ of certiorari by the Secretary, this Court granted the petition, vacated the judgment in Court of Appeals, and remanded the case to the Court of Appeals for further consideration in light of *Heckler* v *Ringer*, __ U.S. __; 104 S. Ct. 2013 (1984), *Heckler* v *Michigan Academy of Family Physicians)*, No. 84-102 (October 1, 1984). On remand, the Court of Appeals first ordered the case dismissed for lack of jurisdiction (Pet. App. 16a), but on Respondent's petition for rehearing the Court reconsidered and found jurisdiction under 28 U.S.C. 1331 (Pet. App. 17a-22a). Contrary to the assertions of Petitioners that the U.S. Court of Appeals ignored this Court's decision in *Ringer, supra*, the opinion of March 19, 1985 juxtaposed the positions of both the Petitioners and Respondents as to the effect of *Ringer* on the Court's previous decision (Pet. App. 20a, 21a). The Court noted that Respondents argued that Petitioners' interpretation of *Ringer* would expand this holding to any challenge under Part B of the Medicare Pro-

gram and effectively preclude any review, a result that would raise serious constitutional questions (Pet. App. 20a). The Court noted that the position of the Secretary was that Respondents could obtain no judicial review of its cause of action and that fn. 4 of *Ringer* was controlling and compelled dismissal of this action (Pet. App. 21a). While stating that the case was one of first impression and presents a close question, the Court found jurisdiction because of the absence of any alternative forum (Pet. App. 22a).

The petition and brief of Petitioners in this matter postures the case such as this Court is to decide whether Congress has effectively precluded any administrative or judicial review of Respondents' statutory and constitutional claims.

SUMMARY OF ARGUMENT

This case presents the issue of whether the Department of Health and Human Services can develop a system of hearings and review that effectively preclude any possibility for the redress of substantial statutory and constitutional claims. There is no question that Congress intended to preclude from judicial review those claims justiciable through the Part B hearing process established pursuant to 42 U.S.C. Section 1395u(b)(3). *Erika, supra*. There is likewise no question that where the Social Security statute provides an avenue for judicial review, such avenue is exclusive and must be followed by any claimants. See *Weinberger* v *Salfi*, 422 U.S. 749 (1975), *Ringer, supra*. Under Petitioners' interpretation of the legislative history and the above cases, however, there can be substantial statutory and constitutional issues for which no review in any forum is available. Petitioners reach this conclusion by expanding the *Erika* decision to apply not just to a claim for benefits, but to any challenge under the Medicare statute other than eligibility. This expansion is evident from the outset of Petitioners' argument wherein they characterize the preclusion of judicial review under 42 U.S.C. 1395ff and 405h as encompassing any challenge "affecting the amount of benefits" payable for medical services under Part B of the Medicare Program (Pet. brief, Question Presented).

Petitioners seek further support for their position from language in the *Ringer, supra*, and *Salfi, supra*, decisions which clearly did no more than require that claimants utilize the administrative and judicial review provisions of the Social Security Act, specifically 42 U.S.C. 405 when available to address the claim at issue.

In this case, Respondents requested an administrative review, but were informed that no such review was available to address the very claims which Respondents wished to pursue. The regulatory and administrative authority pertinent in this matter, in fact, stripped the administrative pro-

cess of the ability to resolve the claims pressed by Respondents. The decisions of this Court have never concluded that 405h or 1395ff preclude jurisdiction over substantial statutory and constitutional claims for which no other review is accorded. Rather, this Court has, in fact, addressed substantial constitutional claims arising out of the Medicare Program. See *Schweiker* v *McClure*, 456 U.S. 188 (1982). This Court's decisions in *Salfi*, *Erika*, and *Ringer* stand for the proposition that claimants must first pursue any administrative remedy before asserting federal court jurisdiction and that federal court jurisdiction is precluded for "amount of benefit" cases. The present case is not properly characterized as an amount of benefit case since Respondents, as in *McClure*, made a broad statutory and constitutional claim against a federal regulation. As in *McClure* there was no administrative forum to address these issues. The claims made did not address the specific amount to be paid, but rather addressed a classification scheme inconsistent with the mandate of the Medicare statute. These claims are certainly not insubstantial as the district court found the statutory violation and that court's decision was affirmed by the Court of Appeals. The Petitioners challenge the lower court only on the issue of subject matter jurisdiction.

The construction of Section 405h and 1395ff advanced by Petitioners would allow Petitioners to violate the law with impunity. Indeed, in the district court Petitioners admitted they had no rationale for at least a portion of its classification, refused the district court's suggestion that a remedy be fashioned, yet now insist that no forum exists for the redress of the very violation they concede. It is respectfully suggested that this Court must interpret 405 U.S.C. 405(h) and 1395ff in such a fashion as to avoid such a serious constitutional issue and in a fashion which also gives meaning and effect to the various provisions of the Medicare Act.

ARGUMENT

I. NEITHER THE MEDICARE STATUTE NOR THE LEGISLATIVE HISTORY SUPPORT THE PROPOSITION THAT, WHILE CONGRESS PROVIDED AN ADMINISTRATIVE FORUM FOR MINOR DISPUTES SUCH AS THE AMOUNT OF PAYMENT ON AN INDIVIDUAL CLAIM, IT INTENDED NO FORUM WHATSOEVER FOR STATUTORY AND CONSTITUTIONAL CLAIMS.

Through the last several years this Court has had three occasions to consider the administrative review mechanisms of the Social Security Act and the related issue of federal court jurisdiction. *Salfi, supra, Erika, supra,* and *Ringer, supra.* In addition, this Court has previously addressed, without any significant discussion of jurisdiction, a constitutional challenge to the administrative review mechanisms under Part B of the Medicare Program. *Schweiker* v *McClure,* 456 U.S. 188 (1982). Any analysis of the impact of these decisions must be viewed in the context of the administrative review mechanisms under Part A and Part B of the Medicare Program. Petitioners have gone into great depth describing the distinctions in the review mechanism under Part A as compared to Part B (Pet. brief at 2), but would appear to abandon such distinctions in their analysis of the above cases. Contrary to Petitioners' suggestion, a review of these decisions indicate that this Court has never interpreted the provisions of the Social Security Act as foreclosing all forums to redress substantial statutory or constitutional issues.

The critical statutory provisions in any analysis of Part B of the Medicare statute and the above case law are Section 1395ff, Section 405, and Section 1395u(b)(3). There are two fundamental flaws to Petitioners' analysis of these statutory provisions as they apply to Respondents' claim. First, the Petitioners attempt to apply the scope of the Section 405 review provisions and select language within *Salfi,* and *Ringer,* to this case. In fact, the review mechanism under

Section 405 has never been available to Respondents and the language of Section 405h simply cannot be interpreted to apply to Respondents' claim. Secondly, Petitioners have failed to acknowledge the limited scope of review available to the fair hearing process established by Section 1395u(b)(3). Petitioners acknowledge briefly the limited jurisdiction of the carrier hearing mechanism (Pet. brief at 15), but then proceed to expand the jurisdictional bar under *Erika* to matters not justiciable in the carrier hearing process. While it is clear that there is no judicial review afforded for fair hearing decisions under Section 1395u(b)(3) Petitioners wish to expand this jurisdictional bar to any claim under Part B of the Medicare Program "affecting" or "concerning" the amount of benefits under Part B, (Pet. brief, Question Presented, at 17, 18). Neither a consistent reading of the statute nor the legislative history supports such an expansive view of the Congressional intent to bar judicial review. A consistent reading of the Medicare statute and the legislative history indicates that Congress intended only to bar those claims justiciable under Section 1395u(b)(3). In essense, Section 1395ff and Section 1395u(b)(3) must be read consistently. The legislative history evidencing an intent to bar judicial review of amount of benefit cases must be read consistent with the statutory provision providing carrier hearings for amount of benefit cases under Part B. The expansion of the legislative history of 1395ff to any challenge affecting the amount of benefits provides a vacuum wherein no forum whatsoever is available for substantial statutory and constitutional claims. Respondents submit that if Congress intended this result, somewhere within the body of the Medicare statute or the legislative history such intent would be disclosed. This Court's previous decisions on Social Security cases, the legislative history, and the Medicare statute itself simply do not support Petitioners' position.

A. 42 U.S.C. 405(h) DOES NOT BAR JURISDICTION UNDER 28 U.S.C. 1331 FOR PART B MEDICARE DISPUTES.

Section 1395ii provides that Subsection 405(h) "shall apply with respect to this subchapter to the same extent as . . . applicable with respect to subchapter II of this chapter."

Section 405(h) of the Social Security Act provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals where parties to such hearing. No findings of fact or decisions of the Secretary shall be reviewed by any person, tribunal, or governmental agency expect as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Section 405(g) provides that any individual after a final decision of the Secretary made after a hearing may obtain review of such decision by a civil action within 60 days brought in the District Court of the United States.

It is Petitioners' position that since Section 405(h) was incorporated into the Medicare Act by Section 1395ii and Section 405(g) was not, Congress clearly intended to foreclose judicial review of all matters under Part B with the exception of eligibility for which judicial review is specifically provided under 1395ff. Despite Petitioners' reliance upon *Erika*, this Court specifically declined in that case to decide the impact of 405(h) on Medicare Part B. See *Erika*, *supra*, fn. 6.

Whether Section 405(h) is applied in a strict literal fashion or, as is dictated by Section 1395ii, "to the same extent to which it is applicable to Title II of the Social Security

Act," Plaintiffs reliance upon the language of 405(h) is misplaced.

405(h) bars judicial review of "the findings and decision of the Secretary after a hearing." In this case no hearing of any sort is available to Respondents, and certainly no hearing is available before the Secretary. Likewise, there were no findings of fact or decision by the Secretary to be reviewed and there is no mechanism within Part B for any findings of fact or decision of the Secretary pertaining to Respondents' claim. Additionally, this case cannot be construed as an action against the United States, the Secretary, or any officer or employee to recover on any claim.

Petitioners ignore the clear language of 405(h) which limits its application to findings and decisions of the Secretary and actions against the United States, Secretary, or officer or employee. Clearly, Blue Cross and Blue Shield enjoys no such status.[3] See *National Association of Patients on Hemodialysis* v *Heckler*, 588 F. Supp. 1108, 1117 (D.C. D.C. 1984).

Just as the statutory language does not support Petitioners' position, the previous decisions of this Court relating to 405(h) simply do not reach the conclusion urged by Petitioners in this case.

In *Weinberger* v *Salfi*, *supra*, this Court faced a constitutional challenge to provisions of the Social Security Act and carefully reviewed each of the three sections contained within Section 405 and concluded that 405(h) constitutes more than a requirement for exhaustion of administrative remedies. The Court further rejected any narrow reading of

[3] In fact, where the Secretary makes findings and decisions on eligibility and amount of benefit matters, it is pursuant to 405(b) with judicial review provided under 405(g). (See 1395ff, Pet. brief at 3.) An expansion of the literal wording of 405(h) to findings and decisions of the carrier distorts the clear import of 405(h) that the prerequisites of the balance of Section 405 must be complied with when available.

the language "any claim arising under . . . the Social Security Act" since the statute provided "both the standing and substantive basis for the presentation of . . . constitutional contentions." Significant in the *Salfi* decision is the distinction of the prior case of *Johnson* v *Robison*, 415 U.S. 361 (1974), the Court noting that acceptance of the government's interpretation of the statute in that case would have meant that no judicial consideration of a constitutional challenge could have taken place. The Court stated:

> Not only would such a restriction have been extraordinary, but such "clear and convincing" evidence would be required before we could have ascribed such intent to Congress . . . but it would have raised a serious constitutional question of the validity of the statute so construed.
> 422 U.S. at 763 (citations omitted).

It is clear from reviewing the decision in *Salfi* that this Court was concerned that Section 405(h) not be interpreted to preclude constitutional challenges. The principle was neither ignored nor forgotten in the subsequent decisions of this Court.

Heckler v *Ringer, supra*, the other decision focusing on Section 405(h), was limited in the main to a discussion of judicial review of a Part A claim. *Heckler* v *Ringer, supra* fn. 4. Respondents' challenged an instruction by the Secretary which denied Medicare reimbursement for a particular surgical procedure. This Court distinguished between the Respondents since three of the Respondents had had the surgery performed prior to the Secretary's limiting instructions whereas a fourth Respondent (Ringer) had yet to undergo the surgery claiming that he could not afford to do so if it was not a covered benefit. Before the administrative review available under Part A had been completed, a challenge was made to the Secretary's limiting instruction through filing suit in federal district court. The precise issue faced by this Court was whether the Respondents could

pursue their claim in federal district court prior to having their claims first channeled into the administrative process available under Part A and, in the case of Respondent Ringer, before the surgery was actually performed.

This Court held that Section 405(h) barred federal court jurisdiction over the Respondents' claims since Respondents had failed to exhaust their administrative remedies provided under Section 405(g) in the confines of their Part A claims. As to Respondent Ringer, this Court declined the invitation not to enforce the provisions of Section 405(h) to a Medicare claimant who had yet to undertake the surgery since to do otherwise would have opened the door and allowed a bypass of the administrative remedy provided by the Act. This Court noted:

> If we allow plaintiffs in Ringer's position to challenge in federal court the Secretary's determination . . . that BCBR surgery is not a covered service, we would be inviting them to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question.
> 104 S. Ct. at 2025.

B. 42 U.S.C. 1395ff AND THE LEGISLATIVE HISTORY OF MEDICARE PART B DO NOT BAR JUDICIAL REVIEW OF ALL STATUTORY AND CONSTITUTIONAL CLAIMS RELATED TO MEDICARE PART B.

The previous decision of this Court that dealt with Part B and Section 1395ff is *Erika, supra*. The judicial action in that case was commenced following an administrative review by the carrier pursuant to 42 U.S.C. 1395u(b)(3)(C). The substantive challenge boiled down to the carrier's determination to base "reasonable charge" upon a price list utilized by Respondent-Provider. There was no constitutional

claim pressed before this Court. See *United States* v *Erika*, *supra*, at fn. 5.

Because 1395ff failed to provide for a hearing by the Secretary (or judicial review thereafter) for "amount of benefit" cases under Part B, and because the legislative history revealed an intent to distinguish between "amount of benefit" cases under Part B and other types of challenges for purposes of judicial review, this Court determined that the administrative hearing afforded in *Erika* was appropriate and no further judicial review was permissible.

Contemporaneously with issuing the *Erika* opinion, this Court also handed down its opinion in *Schweiker* v *McClure*, *supra*. The *McClure* case once again dealt with Part B of the Medicare Program, but was distinct from *Erika* in that the challenge in that case was directed at the hearing procedure mandated by 42 U.S.C. 1395u(b)(3)(C) implemented through regulation. Like the present case, the claim presented by Respondents in *McClure* could not be addressed at the carrier hearing. Relevant to this discussion, the Court did not consider the jurisdictional issue, but went on to substantially address the constitutional claims and ruled that the carrier hearing, as mandated by statute and implemented through regulations, was constitutional. *McClure* was notably distinct from *Erika* since the issues brought before the federal district court were not amount of benefit issues which could be addressed at the administrative hearing, but were rather broad constitutional challenges to overall administrative review to the overall administrative review process adopted by the Secretary and acted upon by the carrier.

From these precedents, Petitioners weave their argument for relief from this Court. From the *Salfi* opinion they take the principle that Section 405(h) applies to any action "arising under" the Medicare Act. From the *Erika* opinion they take the principle that all "amount of benefit" cases are without recourse to judicial review. From the *Ringer* opinion

they take the principle that the administrative channels and judicial review established by Section 405(g) and Section 405(h) cannot be circumvented by premature district court action by clothing benefit cases in procedural dress. Petitioners then characterize the present cases as an "amount of benefits" case which "arises under" the Medicare Act and is hence without federal court jurisdiction. Despite Petitioners' best efforts, the precedent of these cases cannot collectively establish the principle that judicial review is foreclosed in a Part B Medicare case in which a statutory and constitutional challenge is made and for which there is no administrative process to address these challenges. Indeed, the decisions of this Court stand for quite the opposite when read in proper context with appropriate review of both the statutory provisions and the legislative history.

Section 1395u(b)(3) provides as follows:

> Each such contract shall provide that the carrier —
>
> (C) will establish and maintain procedures pursuant to which an individual enrolled under this Part will be granted an opportunity for a fair hearing by the carrier, in any case where the amount in controversy is $100 or more, when requests for payments under this Part with respect to services furnished him are denied or are not acted upon with reasonable promptness or when the amount of payment is in controversy . . .

Section 1395ff provided for judicial review on eligibility issues under Part B of the Medicare Program, but was silent as to other issues. From this silence Petitioners in essence seek to preclude judicial review of all Part B issues including those issues which cannot be adjudicated in the carrier hearing process. Such expansive reading of the Congressional intent is not supported within the legislative history relied upon by this Court in *Erika*. The Committee reports accompanying the original enactment of the Medicare stat-

ute clearly describe the preclusion of judicial review under Part B as pertaining to those matters for which a carrier hearing is available under 1395u(b)(3):

> *(Under the supplementary plan [Part B] carriers, not the Secretary would review beneficiary complaints regarding the amount of benefits, and the bill does not provide for judicial review of a determination concerning the amount of benefits under Part B where claims will probably be for a substantially smaller amount than under Part A)* . . . (S. Rep. No. 404, 89th Cong., First Sess., 54-55 (1965), U.S. Code Cong. and Admin. News 1965, pp. 1943, 1995 (Emphasis added).

Likewise, the Conference Committee on the 1972 amendments of Section 1395ff stated as follows:

> Clarification of Medicare Appeal Procedures.
>
> Amendment No. 561; the Senate amendment added a new section to the House Bill which would make clear that there is no authorization for an appeal to the Secretary or for judicial review on matters *solely* involving amount of benefits under Part B, . . .
> H.R. Rep. No. 92-1605, 92nd Cong., 2nd Sess. 61 (1972), U.S. Cong. and Admin. News 1972, pp. 4989, 5394. (Emphasis added.)

As pointed out, *supra*, the jurisdiction of the hearing officer is carefully circumscribed by regulation and the carrier and the hearing officer is without jurisdiction of considering the legality of the Medicare statute, regulations or guidelines issued by HHS.

Respondents claim simply is not a claim for benefits justiciable in a Part B hearing for which judicial review is barred under the legislative history. The reasonable charge calculation under the Medicare Programs requires an accumulation of similar services to establish a ceiling at that figure which will pay 75 percent of all claims submitted. See

42 U.S.C. Section 1395u(b)(3). Respondents sought the elimination of specialty screens, not the transfer of individual claims from the "generalist screen" to the "specialist screen." The latter remedy would be totally contrary to the crux of Respondents' claim that the maintenance of different screens among physicians for the same service violated the Medicare statute and the United States Constitution. Respondents claims were delineated to address the groupings or classification scheme itself and the illegal and unconstitutional aspects of the disputed regulation. Since Respondents' complaint related to these groupings, a payment dispute on an individual claim could not afford the relief requested. Rather, the overall grouping mechanism had to be reviewed in the context of Petitioners' statutory authority for its actions. Nothing highlights this distinction more than the effect on board certified family physicians such as Respondent Glenn House, M.D. Under the relief sought by Respondents, success on the merits would reduce the amount of payment to Dr. House, who had been placed in the specialist screen.

Petitioners complain of the broad impact of the lower court's decision on the merits (Pet. brief at 26), yet cite the legislative history barring judicial review of individual claims as applicable. The relief Petitioners complain of simply involves a remand of the Secretary with instructions to consider similar service as a criteria for the determination of reasonable charges (Pet. App. 14a, 15a). A Part B adjudication on an individual claim or even on every entry submitted by the Respondents could not address the statutory violation. Rather, every claim submitted under Part B of the Medicare Program in the State of Michigan had to be regrouped in order to comply with the statute. This is exactly what the Secretary did upon remand. Far more thorough than Petitioners' characterization of Respondents' case as a challenge "affecting the amount of benefits" was the analysis of the Court of Appeals on this issue:

> In this case BCBSM contends this suit involves simply a dispute over the amount of reimbursement due. In a word, BCBSM contends, Michigan Academy is simply seeking to have family physicians and their patients moved to the more lucrative specialty screen, boiling down to an argument for an increase in amounts reimbursed. *Erika*, it concludes, should bar this suit outright. This argument, however, is without merit.
>
> While the eventual result of this suit may cause an increase in amounts of reimbursement, this does not necessarily follow. In some cases the result may be an increased amount of reimbursement and in other cases a reduction in reimbursement could occur. Michigan Academy, at bottom line, is challenging the overall mechanism for determining the amounts of reimbursements, not the actual value of any particular reimbursement. (Pet. App. at p. 8a).

Although it is clear under *Erika* that Congress did intend to foreclose judicial review of Part B claims which challenge payment for a given service, Petitioners' position paints with too broad a brush and would foreclose those claims not within the authority of the hearing officer to decide. Respondents submit that simple logic dictates that the words "amount of benefits" be given a consistent reading. The legislative history which clearly intends to preclude judicial review of Part B carrier hearing decisions must be read consistent with 1395u(b)(3)(C) and the regulations promulgated thereunder which specifically preclude a carrier hearing for the type of issues raised by Respondents. The case at bar involves a statutory and constitutional challenge to a regulation promulgated by HHS, and is not an amount of benefit case which can be adjudicated through the Part B carrier hearing process. Since the determination of these challenges are beyond the carrier's authority, the legislative history concerning judicial review of carrier determinations have little application.

The Petitioners' attempt to chastise the U.S. Court of Appeals for its most recent opinion amply demonstrates the tendency of the Petitioners to merge the requirements of Section 405(h) and the amount of benefit cases precluded by the legislative history describing Section 1395ff.

Petitioners criticize the Sixth Circuit on the basis that the Court characterized *Ringer* as not relying upon Section 1395ff. In fact, *Ringer* was a Part A case rendering the legislative history of 1395ff inapplicable. The hearing and judicial review provisions of 405(b) and (g) were applicable to the claim made in *Ringer.*

Surely, had Congress intended to preclude all challenges under Part B of the Medicare Program for all cases other than eligibility, including statutory and constitutional challenges, Congress would have said so, if not within the statute, at least within the legislative history. See *Abbott Laboratories* v *Gardner,* 387 U.S. 136 (1967).

Finally, Petitioners suggest that the opinion of the U.S. Court of Appeals in this case would foster widespread litigation over minor disputes which in part precipitated this Court's decision in *Erika.* Such an assertion simply ignores what Respondents have already conceded, there is no judicial review for those issues justiciable in a Part B carrier hearing. Such issues include whether or not the services rendered were medically necessary (contrast Part A, *Breeden* v *Weinberger,* 377 F. Supp. 734, 738 (N.D. LA. 1974); *Westgard* v *Weinberger,* 391 F. Supp. 1011, 1018 (D.C. N.D. 1975)), and whether or not the level of service billed under the Physician's Manual is documented within the medical records. Such issues are best left to the carrier which has both the expertise and experience in dealing with such issues in its private insurance program and is consistent with the legislative history barring judicial review on an individual claim.

In fact, the Sixth Circuit has recognized the holding in *Erika* in denying jurisdiction on a claim for payment for a particular service under Part B of the Medicare Program, both prior to and subsequent to the rendering of its decisions in this case. In *Hertzog* v *Secretary*, 682 F. 2d 121 (6th Cir. 1982) the Court of Appeals for the Sixth Circuit faced a case in which the claimants disputed the denial of reimbursement for chelation therapy. Claimants sought and were provided an administrative review of this adverse decision. They subsequently filed suit in the federal court, but made no constitutional challenge to the determination until an adverse district court opinion led to the Court of Appeals' review. The Court of Appeals, relying extensively on this Court's opinion in *Erika* ruled that federal court jurisdiction did not exist to hear the claimant's amount of benefit case.

Most recently in *Good Samaritan Medical Center* v *Secretary of Health and Human Services*, No. 84-3923 (November 7, 1985) the Sixth Circuit recognized under *Ringer* that Section 405(h) bars Part A Medicare cases where recourse is not attempted through the administrative procedures set forth within Section 405, specifically distinguishing its prior decision in this case on the basis that Respondents here "could only reach the federal courts under the jurisdiction grant of Section 1331" (sl. op. at 11).

Petitioners argue that the Sixth Circuit decision would permit judicial review under Part B whenever a claimant characterizes a challenge to an amount of benefits payable under Part B as a challenge to a regulation of the Secretary or a general policy of the carrier that has a bearing on the disposition of individual claims (Pet. brief at 17). Such an assertion ignores the limited impact of the lower court's opinion in this case as evidenced by the Sixth Circuit's own prior and subsequent decisions. This Court in the past has drawn distinctions between factual application of statutory standards and a misconstruction of the governing legislation. See *Lindahl* v *Office of Personnel Management*, ____ U.S.

____; 105 S. Ct. 1620 (1985). One would expect the lower courts to adhere to such a distinction. Clearly, the Sixth Circuit has done so.

C. ALTHOUGH RESPONDENTS' CLAIMS CANNOT BE CHARACTERIZED AS A CLAIM FOR BENEFITS, RESPONDENTS SUBMIT THAT JUDICIAL REVIEW IS AVAILABLE FOR STATUTORY AND CONSTITUTIONAL CLAIMS EVEN INVOLVING A CLAIM FOR BENEFITS.

Petitioners correctly points out that *Erika* involved statutory claims. Although this issue is not a required holding for Respondents to prevail, it is the position of Respondents that statutory claims which cannot be heard by the carrier are subject to judicial review. Such issues, although rarely meritorious, are easily determined.

Petitioners agree that Congress afforded a forum through 1395u(b)(3) for minor adjudications on individual claims such as arithmetic calculations and the medical necessity of a particular service rendered. In contrast, Petitioners urge that there is no forum to address substantial statutory or constitutional claims. Petitioners' position, if accurate, has the bizarre result of awarding a forum for all claims except those of greatest import. The distinction between those issues justiciable in a Part B hearing for which there is no judicial review and a meritorious statutory claim can be amply demonstrated by the types of cases for which Respondents admit there is no review. Section 1395(y) provides that no payment may be made for services which are not reasonable and necessary for the diagnosis or treatment of illness or injury. Whether a service is medically necessary is left to the carrier under Part B. It is quite another matter, however, should the Secretary or the carrier affirmatively decide not to pay for admittedly medically necessary services. Likewise, whether or not chelation therapy is a reasonable service for the treatment of illness is a matter left to the expertise of the carrier, see *Hertzog, supra*. In

contrast, a flagrant refusal to pay well recognized medical services contemplated by Congress without some form of judicial review would result in an unprecedented granting by Congress of absolute discretion on the part of an agency in conjunction with a private insurance company to comply or choose not to comply with an act of Congress.

To the extent *Erika* addressed this issue, Respondents submit that the full scope of this issue was not reviewed by the Court at that time. In fact, the supplier of services in *Erika* did not point out to the Court the lack of authority on the part of the Part B hearing officer to address statutory claims. Furthermore, the Court's opinion made it clear that the issue of the authority of Congress to limit review for any forum on statutory claims were not properly pressed by Respondent in that case. *Erika*, *supra*, fn. 14.

Contrary to the assertions of Petitioners, this Court has not considered the full import of barring any forum to review statutory claims under Part B.

D. RESPONDENTS' CONSTITUTIONAL CLAIMS ARE SUBSTANTIAL.

Rather than address the issue of Congress' power to bar any forum whatsoever to address statutory and constitutional claims, Petitioners, not having appealed on the merits, now suggests that Respondents' constitutional claims are insubstantial. This statement is offered by Petitioners with no citation to the trial record in support of any rationale they can espouse, no acknowledgement that the lower court did, in fact, deny Petitioners' motion for summary judgment on the constitutional issue, and no admission that Petitioners, in fact, did concede at trial that at least as to board eligible family physicians, Petitioners could offer no rationale for their actions.

In *Hagans* v *Lavine*, 415 U.S. 534 (1974) the Supreme Court considered whether the lower court properly exer-

cised subject matter jurisdiction in a case arising out of the AFDC Program. The district court in *Hagans* had accepted subject matter jurisdiction based upon the constitution allegations made by plaintiffs, but then had resolved the case on a pendent, statutory basis. The Supreme Court approved of the actions of the district court and reaffirmed the "substantiality doctrine" of federal question jurisdiction. The Court noted that since a "substantial" question is necessary to support jurisdiction, the question became whether the allegations made were so attenuated and insubstantial as to be absolutely devoid of merit or whether the claims made were "wholly and substantial", or "wholly insubstantial", "obviously frivolous", "plainly insubstantial", or "no longer open to discussion." *Hagans, supra,* at 415 U.S. 536-7. Even though the case involved a constitutional attack on the field of social welfare, the Supreme Court found the constitutional allegations substantial, noting:

> In *Dandridge* v *Williams*, 397 U.S. 471 . . ., AFDC recipients challenged the Maryland Maximum Grant Regulation on equal protection grounds. We held that the issue should be resolved by inquiry whether the classification had a rational basis. Finding it did, we sustained the regulation. But *Dandridge* evidenced no intention to suspend the operation of the equal protection clause in the field of social welfare law. The state law and regulations must still 'be rationally based and free from invidious discrimination.' 415 U.S. at 539.

The level of judicial scrutiny of legislative or administrative classifications is dependent upon the nature of the classification, the importance of the right being affected by the classification, and the legitimacy of the governmental interest advanced by the classification. Compare *Dandridge, supra, Califano* v *Aznavorian*, 439 U.S. 170 (1978); *Salfi, supra.*

It is interesting that in the cases commonly cited by the government, the underlying rationale for the governmental

policy ultimately upheld was either to reduce costs, facilitate administrative convenience or prevent fraud. Here the evidence at trial was unrebutted that the rationales normally asserted by the government in substantive due process cases were actually defeated by the government's practice in this case.

The evidence at trial again was unrebutted that the multiple screen system exacerbates the maldistribution of physicians, the physician's choice of specialty, and the patient's choice of physicians (Feldstein, D.E. 130 at 11, Joseph Califano, D.E. 135, Exhibit 30 at 9, Robert Derzon, D.E. 135, Exhibit 29).

Petitioners now suggest, without citations to the record, that the regulation in question was promulgated to reflect the already existing marketplace (Pet. Brief at 39). Ironically, the record in this case established that the regulation in question has precisely the opposite effect. The unrebutted testimony in this case was that a single prevailing fee calculation would result in a lower charge per service, render the Medicare Program efficient, and more correctly bring market forces in to play (Feldstein, D.E. 130 at 14). Likewise, the multiple prevailing fee concept has the effect of moving the patient towards more expensive costs for the same service (Feldstein, D.E. 130 at 11). Supporting Feldstein were statements by Joseph Califano, past Secretary of HHS, and Robert Derzon, Administrator of the Health Care Financing Administration. (D.E. 135, Pl. Ex. 29, 30).

Petitioners find themselves in the untenable position of defending a regulation which operates contrary to any stated rationale. It is a little more ironic that Petitioners can concede irrationality at least in part at trial, fail to offer rationale for the regulation at trial, and then insist that the jurisdiction does not exist since no valid constitutional claim can be made. Petitioners failed to appeal on the merits and specifically failed to appeal the denial of summary judgment wherein the lower court found the Respondents' constitutional claim to be substantial.

II. ASSUMING, ARGUENDO, THE MEDICARE STATUTE AUTHORIZES AN AGENCY OF THE FEDERAL GOVERNMENT TO VIOLATE THE MEDICARE STATUTE OR THE FIFTH AMENDMENT WITH NO REDRESS THE STATUTE VIOLATES ARTICLE III AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Constitution provides a basis for Congress to limit the jurisdiction of the lower federal courts and the Supreme Court. The power to create the inferior federal courts, granted in Articles I and III of the Constitution, has been held to imply the power to establish the jurisdiction of those courts. However, the powers granted to Congress in Articles I and III of the Constitution have never been held by this Court to enable Congress to prohibit judicial review of the constitutionality of any act of Congress or any regulation promulgated pursuant thereto. Indeed, such a proposition would entail rethinking the supremacy principle, which has been the underpining of our constitutional system, announced in *Marbury* v *Madison*, 5 U.S. (1 Cranch) 137 (1803).[4]

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[4] Though there has been considerable academic debate over the various intricacies of the power of Congress to limit the jurisdiction of the Supreme Court and the lower federal courts, "all agree that Congress cannot bar all remedies for enforcing federal constitutional rights." Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide To The Ongoing Debate*, 36 STAN. L. REV. 895, 921 note 113. See also, Brilmayer and Anderhill, *Congressional Obligation To Provide A Forum For Constitutional Claims: Discriminatory Jurisdictional Rules And The Conflicts Of Law*, 69 VA. L. REV. 819 (1983); Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246 (1971); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

Jurisdictional limitations enacted by Congress are not exceptions to *Marbury* principle. This Court's decisions have consistently scrutinized the constitutionality of jurisdiction limiting acts of Congress. See, e.g. *Yakus* v *United States*, 321 U.S. 414, (1944) (wherein the court notes that Congress has the power "to define the jurisdiction of inferior federal courts and to create such courts for the exercise of a judicial power . . . subject to other constitutional limitations . . ."); and *Johnson* v *Robison, supra*. See also, *United States* v *Klein*, 80 U.S. (13 Wall.) 128 (1872); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

The separation of powers principle embodied in our constitutional framework makes it axiomatic that it is the province of the Court to review actions of both the legislative and executive branches of government for their constitutionality. In *Marbury, supra*, Chief Justice Marshall, writing for the Court, stated as follows:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Court must decide on the operation of each.
>
> So, if a law be in opposition to the constitution; if both the law and constitution apply to a particular case . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. 5 U.S. (1 Cranch) at 177-178 (1903).

This view of *Marbury* was emphatically discussed by this Court in *Cooper* v *Aaron*, 358 U.S. 1, 3 (1958), wherein the Court stated as follows:

> Article VI of the constitution makes the constitution the 'supreme law of the land.' In 1903, Chief Justice Marshall, speaking for a unanimous court, referring to the constitution as the 'fundamental and paramount law of

> the nation,' declared in the notable case of *Marbury* v *Madison*, (U.S.) 1 Cranch 137, 177, 2 L. Ed. 2d 60, 73, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the expedition of the law of the constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.
> 358 U.S. at 17-18.

This Court has long held that a "person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stockyards Co.* v *U.S.*, 298 U.S. 38, 84 (1936). (Brandeis, J. concurring). The right to such judicial review goes beyond constitutional claims, such as made in this case. For example, in *Addison* v *Holly Hill Fruit Products*, 322 U.S. 607 (1944), this Court discussed the right to judicial review regarding administrative regulation. Therein, the Court noted that the "determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." 322 U.S. at 616. That case clearly stands for the proposition that where, as in the present case, there is a question as to whether a regulation goes beyond the extent of power delegated by Congress, the litigant is entitled to a judicial determination of the issue. See also, *United States* v *Vogel Fertilizer Company*, 455 U.S. 16 (1982), (wherein the court struck down a treasury regulation noting that it was not a "reasonable statutory interpretation").

Another case discussing the duty of Congress to provide a forum for claims is *Yakus* v *U.S.*, *supra*.[5] *Yakus* involved a criminal action against an individual for allegedly violating the wartime Emergency Price Control Act of January 30, 1942. The statute set up a procedure whereby individuals affected could challenge regulations issued pursuant to the act through an administrative review process, together with appellate rights to an energency Court of Appeals organized by Congress and with review by the Supreme Court on writ of certiorari.[6] The petitioners in *Yakus* were individuals who were convicted of criminally violating the Emergency Price Control Act. They attempted to challenge the validity of the act and regulations in their criminal cases, but were denied the opportunity to do so, the lower courts noting that they had failed to use the mechanisms organized by the act for such challenges. The Supreme Court upheld the rulings of the lower court noting that the statute provided adequate opportunity for the petitioners to have challenged the validity of the act and regulations. The court noted that the statute provided full due process rights to the petitioners:

> The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction.

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[5] See Hart, *The Power of Congress To Limit The Jurisdiction Of Federal Courts: An Exercise In Dialectic*, 66 HARV. L. REV 1362 (1953), wherein Professor Hart notes that "[s]hutting of the courts from questions of law determinative of enforceable duties was one of the things *Yakus* assumed that Congress could not do." In Professor Hart's dialogue, he includes the following colloquy:

> Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunities to have them determined by a court has previously been accorded. When you do, I am going back to rethink *Marbury* v *Madison*. Hart, at 1378-79

[6] The process set up by this statute was found to be constitutional in *Lockerty* v *Phillips*, 319 U.S. 182 (1943).

* * *

> Such a procedure, so long as it affords those affected a reasonable opportunity to be heard and present evidence does not offend due process. [Citations omitted.]
>
> * * *
>
> The Emergency Court has power to review all questions of law, including the question whether the administrators determination is supported by evidence, and any questions of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court.
>
> * * *
>
> There is no constitutional requirement that the test of the validity of regulations, or administrative action be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. 321 U.S. at 433-444.

Yakus upheld the exercise of Congress' wartime powers in enacting the Emergency Price Control Act noting that Congress had fulfilled its obligation to provide a forum in which those affected by the regulations could challenge their validity. *Yakus*, despite its provisions for a forum in which to challenge regulations, has been viewed as an unusual decision, rendered during a war time emergency. *Ademo Wrecking Co.* v *United States*, 434 U.S. 275, (1978) (Justice Powell, concurring). Justice Powell, in his concurring opinion, cited the brief for the United States in *Yakus* noting that the government argued that the statute should be upheld under the war powers authority of Congress. It was noted that war time emergency could justify "the shortcutting of

normal due process rights." 434 U.S. at 290.

In contrast, the present case is postured, as the Sixth Circuit noted, such as "[i]n the absence of federal question jurisdiction, therefore, the Secretary would have unbridled discretion to promulgate any regulation he chose." (Pet. App. at 10a).[7]

Recent decisions of this Court also stress the requirement for a proper forum in which litigants can press their claims. In *Northern Pipeline Construction Co.* v *Marathon Pipeline Company*, 480 U.S. 50 (1982) this Court held, in a plurality opinion, that the Bankruptcy Reform Act's broad grant of jurisdiction to bankruptcy judges providing "jurisdiction of all civil proceedings arising under Title 11 or arising in relation to cases under Title 11," violated Article III of the Constitution. Citing *Crowell* v *Benson*, 285 U.S. 22 (1932) and *United States* v *Raddatz*, 447 U.S. 667 (1980), the Court noted that Congress may not assign "essential attributes of the judicial power" to non-Article 3 courts or administrative bodies. The Court noted that in *Raddatz*, *supra*, it sustained the use of an adjunct fact finder for constitutional claims, "so long as the adjuncts were subject to sufficient control by Article III district court." 478 U.S. 78-79. The court in *Raddatz* upheld the 1978 Federal Magis-

[7] The above rule, of course, is necessary to avoid an impermissible delegation to a private party of adjudicatory functions. It has long been held that governmental agencies may only assign limited duties to private agencies. See, e.g., *Nassau Securities Service* v *Securities and Exchange Commission*, 348 F. 2d 133 (2d Cir. 1965), (holding that it was permissible to assign certain administrative duties to a private party relating to securities regulation where the action of the private party is subject "to full review by the Securities Exchange Commission, a wholly public organ, with a hearing before it if requested, the taking of further evidence it may deem relevant, and a decision based on its own findings."); and *New Motor Vehicle Board Of California* v *Orrin W. Fox Co.*, 439 U.S. 96 (1978), (indicating that under limited circumstances administrative duties may be assigned to private parties). No cases decided by this Court or any other federal court have held that questions relating to the legality of regulations, including statutory and constitutional questions, may be delegated to a private party (such as the Medicare carrier in this case) without access to judicial review.

trates Act, which permitted district judges to refer certain pretrial motions to magistrates, but provided for de novo review by the district court. The lead opinion of this Court in *Northern Pipeline* cited favorably the edict of *Crowell* relating to the essential functions of the judicial power. In pertinent part, the lead opinion states as follows:

> But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign fact-finding functions to an adjunct created to aid in the adjudication of Congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellant's argument— that Congress possess the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress. (Emphasis in original) Indeed, the validity of this proposition was expressly denied in *Crowell*, when the court rejected 'the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved', 285 U.S. at 60-61, 52 S. Ct. at 296 (emphasis in original) [Footnote omitted] and stated that
>
> > 'The essential independence of the exercise of judicial power of the United States in the enforcement of *constitutional* rights requires that the federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts solicited before it.' Id. at 64, 52 S. Ct. at 297 (emphasis and parenthetical statement in original).
>
> 458 U.S. at 83-84

The Court in *Northern Pipeline* further commented on the requirement that, under any act of Congress, the "essential attributes of the judicial power" may not be removed from Article III courts. Acts of Congress that attempt to restrict judicial review pertaining to functions that have been traditionally performed by the Judiciary

"cannot be characterized merely as incidential extension of Congress' power to define rights that it has created." 458 U.S. at 84. The plurality opinion noted that such action on the part of Congress would be an unwarranted encroachment "upon the judicial power of the United States, which our Constitution reserves for Art. III courts." 458 U.S. at 84.

Many of the recent directives of this Court have also noted the requirement that Congress must provide a mechanism whereby litigants can assert statutory and constitutional claims to avoid the unconstitutionality of the statute itself. For example, in *South Carolina* v *Regan*, ____ U.S. ____, 104 S. Ct. 1007 (1984), the plaintiff invoked the original jurisdiction of the Supreme Court pursuant to Section 2 of Article III of the United States Constitution. The defendant objected on the grounds that the Anti-Injunction Act, 26 U.S.C. Section 7421(a), prohibited judicial review of the claims made by the plaintiff. The court noted that it would not construe the statute to preclude the action where "Congress has not provided the plaintiff with an alternative legal way to challenge the validity" of the law at issue. See also, *Harrison* v *PPG Industries, Inc.*, 446 U.S. 578 (1980), and *Block* v *Community Nutrition Institute*, ____ U.S. ____, 104 S. Ct. 2450 (1984) (indicating that judicial review of milk market orders issued by the Secretary of Agriculture under the authority of the Agricultural Marketing Agreement Act of 1937 were subject to judicial review in relation to proceedings brought by handlers in accordance with the statute, after following administrative procedures, but unavailable to individual consumers of milk, whose interests were represented by the handlers).

By way of summary then, there is no authority whatsoever that would support the position urged by the Petitioners whereby the Respondents may not have any review whatsoever of their statutory and constitutional claims. The basic principles of due process require a rejection of the

Petitioners' contentions. If the court accepts Petitioners' contention that judicial review of both Plaintiffs' statutory and constitutional claims is precluded by the statute, the statute would, as a matter of necessity, be unconstitutional under authority of the cases discussed above. Congress cannot legislate away Respondents' due process rights and rights to a competent forum in which to assert their statutory and constitutional claims.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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